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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 700

ELECTRIC BOND AND SHARE COMPANY,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION, WILLIAM F. STUBERFIELD *et al.*, ALFRED B. CORNELL *et al.*, and JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT BRIEF FOR RESPONDENTS WILLIAM F. STUBERFIELD *et al.*, ALFRED B. CORNELL *et al.*, AND JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, IN OPPOSITION

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Preliminary Statement

This brief is submitted by the respondent Stuberfield and Cornell Committees, representing holders of $6 Preferred Stock Certificates of Electric Bond and Share Company (Bond and Share), and by the respondent John Hancock Mutual Life Insurance Company, also a holder of $6 Preferred Stock Certificates, in opposition to Bond and Share's petition for a writ of certiorari.

Opinion Below

Because Bond and Share chose to file a petition for a writ of certiorari before the Court of Appeals had an opportunity to render judgment, there is no opinion of that court. The opinion of the District Court is reported at 95 F. Supp. 492 (R. 4). The findings and opinion of the Commission, dated July 28, 1950, have not been officially reported, but are set forth in Holding Company Act Release No. 9980 (R. 36).

Jurisdiction

The order of the District Court, a part of which is sought to be reviewed, was entered on March 2, 1951 (R. 16). Petitioner invokes the jurisdiction of this Court under 28 U. S. C. § 1254, made applicable by Section 25 of the Public Utility Holding Company Act of 1935, 49 Stat. 835, 15 U. S. C. § 79y.

Statute Involved

The statute involved is Section 11(e) of the Public Utility Holding Company Act (the Act). The section is set forth in the Appendix hereto.

Questions Presented

1. Whether this is an appropriate instance in which to grant certiorari prior to rendition of judgment by the Court of Appeals.

2. Whether, in measuring the rights of the $6 preferred stockholders under a Section 11(e) plan which retired their

stock, the Commission erred in holding that such stockholders were entitled to receive sums equivalent to the investment value of their stock on a going concern basis rather than the sum specified in Bond and Share's charter to be payable upon "any liquidation, dissolution or winding up of the affairs of the corporation or any distribution of its capital, whether voluntary or involuntary."

3. Whether the District Court erred in holding that there was substantial evidence to support the Commission's appraisal of the investment value of the $6 preferred stock.

4. Whether the Commission erred in awarding compensation for delay as it did.

Statement

In the interest of brevity we avoid recital of the facts and rely therefor on the statement contained in the concurrent brief filed herein by the Commission.

ARGUMENT

Summary of Argument

Petitioner seeks a writ from this Court prior to rendition of judgment by the Court of Appeals. It is the position of these respondents that the petition should be denied for the following reasons:

(1) The situation here is not such as to warrant the unusual remedy of the issuance of a writ prior to judgment by the Court of Appeals. Principles of judicial economy require denial of the writ at the present time (Point I, post).

(2) The principal questions that petitioner asserts to be presented are in fact not posed by the record in this case (Point II, post).

(3) The questions actually presented in this case have recently been resolved (and contrary to the position of the petitioner) by this Court in its opinions in the *Engineers** and *Otis*** cases, and there is no conflict between Circuits (Point III, post).

POINT I

The writ should not be issued prior to judgment by the Court of Appeals.

Concededly, the issuance of a writ prior to judgment by the Court of Appeals is an unusual remedy seldom accorded a petitioner. As stated by Mr. Justice FRANKFURTER, concurring in part and dissenting in part in *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368, 384 (1949):

> "The power which Congress has given to this Court to short-circuit the Courts of Appeals should not be exercised except for some compelling reason of wise judicial administration."

The "compelling reason" which petitioner asserts in the present instance is that, among the four questions it claims to be presented, one, so it asserts, is common with a question raised in *Federal Liquidating Corp.* v. *S. E. C.*,*** in which a petition for a writ is presently pending in this Court.

Although these respondents are not parties to the *Federal* case and have limited knowledge thereof, it seems clear from the opinion of Judge LEARNED HAND, writing

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* *S.E.C.* v. *Central-Illinois Securities Corp.*, 338 U. S. 96 (1949).
** *Otis & Co.* v. *S.E.C.*, 323 U. S. 624 (1945).
*** *Federal Liquidating Corp.* v. *S.E.C.*, 187 F. 2d 804 (2nd Cir. 1951).

for the Court of Appeals for the Second Circuit, that the decision of that Court in the *Federal* case is wholly consistent with, and is in fact required by, this Court's decisions in the *Engineers* and *Otis* cases, and that, therefore, this Court should conclude that there is no occasion for the issuance of a writ in that proceeding.

In any event, even the single question to which petitioner points is not identical in both cases. As petitioner admits, in the *Federal* case an issue is presented as to the impact of a charter liquidation provision where the Company did, in fact, liquidate pursuant to State law. In the instant case, concededly there was no liquidation; there was no exercise of a charter provision under State law but merely a naked assertion on the part of petitioner that it could have exercised a charter right and probably would have (petitioner's brief, p. 14). As to both of these assertions the Commission and the District Court found against petitioner—thus no identical question of law exists in both cases, and, therefore, the issuance of a writ prior to judgment by the Court of Appeals is unwarranted on that ground.

Even if a common question of law be presumed to be presented to a limited extent, there are two particular reasons why that should not lead to short-circuiting the Court of Appeals in the present instance. Both reasons are based upon fundamental principles of judicial economy.

The first is that there are at least three additional questions presented by petitioner, not claimed by it to have any identity with the *Federal* case, which would compel this Court to undertake the consideration and decision of very complicated and factual matters, having nothing whatsoever to do with the *Federal* case and which in any event should be reviewed by the Court of Appeals in the first instance.

Thus, the second and third questions presented by petitioner relate to detailed determinations made by the Commission as to the investment value of Bond and Share's $6 preferred stock. Further, petitioner announces its intention (petitioner's brief, pp. 32-33) to argue before this Court, if the present petition is granted, the entire and all-comprehensive question of whether the findings of the Commission respecting the investment value of the $6 preferred stock are supported by substantial evidence on consideration of the record as a whole. Obviously, the foregoing questions are mainly factual, and are unique to the Bond and Share situation and in no way concern the *Federal* case since different companies and different stocks are involved.

The truth is that petitioner can have little hope of winning on its "charter argument" (which argument the District Court adequately disposed of in its opinion). What petitioner really seeks is to tie this case to the *Federal* case by urging that the charter argument is identical, and then, if a writ is obtained, to argue before this Court the investment value findings of the Commission and whether there was substantial evidence to support them. Respondents do not claim that petitioner has no right to appeal the District Court's decision on those primarily factual points. The position of the respondents, however, is that the petitioner clearly should take its appeal on those points first to the Court of Appeals.

The second particular reason why the Court of Appeals should not be short-circuited in the present instance is that there is another appeal now pending in that Court in this very case. That other appeal, an appeal by holders of $5 Preferred Stock Certificates, will require consideration by the Court of Appeals of the identical record which is now filed in this Court by petitioner. If a writ is sought from that determination by the Court of Appeals, this Court

will have before it for a second time the same record that it is now requested to consider. As a consequence, the grant of the instant application for a writ prior to judgment by the Court of Appeals will not result in the avoidance of "further futile proceedings" below (*Stainback* v. *Mo Hock Ke Lok Po, supra,* at p. 371). On the contrary, it can only occasion a wasteful duplication of judicial effort by causing a consideration of a single case in the Court of Appeals and in this Court at one and the same time, with a very real possibility of a subsequent and otherwise unnecessary reconsideration by this Court of the same record.

POINT II

The principal questions that petitioner asserts to be presented are in fact not posed by the record.

Respondents submit that the writ should be denied for the additional reason that an examination of the opinions of the Commission and the District Court discloses that the principal questions as propounded by petitioner are not, in fact, presented, and that the issues actually presented are of no general importance but are only of significance to these particular parties and in this particular litigation.

The petitioner asserts that the first question presented* is the legal issue as to whether it conforms to the fair and equitable standards of Section 11(e) of the Act to accord the preferred stockholders an amount which exceeds the liquidation preference stated in the charter, where a company, under its charter, could have and also probably would have retired its preferred stocks under the liquidation provision in its charter.

* The only one it urges as common with any of the questions presented in the *Federal* case (*supra*, pp. 4-5).

Whatever academic interest this question may have,* it is not one that is here presented. Before that question could be properly raised, it would be necessary for the Commission and the District Court to have found that Bond and Share could have and probably would have retired its preferred stocks under the liquidation provision in its charter, but, that, nevertheless, the fair and equitable standards of Section 11(e) of the Act required that the preferred stockholders be paid an amount exceeding that liquidation preference.

However, and just to the contrary, the District Court found that the liquidation provision could not have been invoked in this situation to retire the preferred (R. 9), and the Commission found that in any event the preferred probably would not have been retired, absent the compulsion of the Act (R. 53-54). It is not of present moment whether or not those conclusions of the District Court and Commission were correct (we demonstrate, post, p. 12, that they were correct). The important point is that clearly this Court should refuse to review questions as to whether the District Court properly construed Bond and Share's charter under applicable State law, and whether the Commission properly found that, absent the Act, Bond and Share would not, rather than it would, have retired its preferred stocks. These issues, involving as they do merely the determination of the narrow question of the construction of a corporate charter under the New York Stock Corporation Law, and the equally narrow and purely factual issue of what a company probably would or would not have done as a matter of business policy, are clearly issues of no general importance but only of significance to these particular parties and in this particular litigation. Under such circumstances, it is settled that this Court will not grant

* We demonstrate (*post*, pp. 10-11) that the question has been fully answered by this Court's opinions in the *Engineers* and *Otis* cases.

certiorari. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 393 (1923).

So, too, with the second question sought to be presented. Petitioner urges that there is a legal issue raised by the record as to whether it was proper and consistent for the Commission, in determining the investment value of the $6 preferred stock, to give recognition to reorganizations of subsidiary companies under the Act, when the evidence is clear that, but for the Act, a reorganization of the subsidiaries would have been impossible (petitioner's brief, pp. 3, 29-31). If the evidence were clear, and if the Commission, in recognition thereof, had held that nevertheless the impact of the Act on the subsidiaries must be taken into consideration, its determination would still have been wholly in accord with the opinion of this Court in the *Engineer's* case. (We discuss this post, p. 14). But, again, that question is not presented.

The Commission nowhere held that these reorganizations would never have taken place but for the Act. On the contrary, the evidence in the record is to the effect that the reorganization of these subsidiaries would have taken place absent the Act. So petitioner's own expert testified at the hearings (R. 392). Whether this evidence should have been accepted or whether subsequent inconsistent testimony tendered by petitioner (R. 369) was entitled to greater weight is clearly not an issue of sufficient public importance to warrant review by this Court. In any event, the legal question, as stated by the petitioner, is not before the Court.

The third question petitioner wishes to propound is whether, within the prohibition of this Court's opinion in the *Engineers* case, the Commission employed as a standard a period of abnormally high market values of a transient nature (petitioner's brief, pp. 3, 31-32). Admittedly, the

period employed by the Commission was that prevailing between November, 1945 and March, 1947, a period of almost a year and a half. A period so extensive does not factually support submission of a purported legal question as to whether the Commission could properly use as a standard an abnormally high market value of a "transient" nature.

The fourth question is properly in the case, though here petitioner chooses to describe as "interest" what the Commission has more properly characterized as "compensation for delay" (R. 81). But, as we demonstrate hereafter, this is the identical question that was previously before this Court in the *Engineers* case, and the determination of the Commission herein follows and is consistent with the holding of this Court there.

POINT III

In any event, the questions presented are settled against petitioner by this Court's decisions in the *Engineers* and *Otis* cases.

A

In the *Engineers* and *Otis* cases, this Court held that the measure of a preferred stockholder's claim in a reorganization under Section 11 of the Act is the fair investment value of his preferred stock on a going concern basis.

In the *Engineers* case this Court stated expressly that investment value and not charter rights is the constant, and only to the extent that the charter right affects investment value is it to be given consideration:

> "* * * charter provisions have been held invariably not to be determinative."

> "* * * investment values rather than charter provisions provide the measure of the preferred stockholders' rights."*

Nevertheless, Bond and Share urges (Point I) that charter provisions and not investment value are here controlling. It argues that it could have effected a "distribution of capital" of $100 per share to the preferred stockholders under its charter and, consequently, that that amount is the limit of fair and equitable treatment under the Act.

The sole basis for this contention is that in the *Engineers* case, this Court, in mentioning that the redemption provision is the ceiling to which a preferred stockholder is entitled, gave as a reason that "the Company could have called the stock at that price at any time absent the Act" (petitioner's brief, p. 16). Bond and Share, taking the "could" out of its context, urges that wherever a charter provision "could" be employed, that provision represents the maximum allowable payment.

It is clear, however, that where a company can call its preferred and it is a security of such investment quality that, absent the call limitation, it would sell at a price in excess of call, a company that has the power to call would do so and refund. It will do so, for, by hypothesis, it can acquire a like amount of preferred capital at a lower dividend cost. Hence, the market value of such a security will not rise above that call price. The Commission, in recognition of this fact, has made the call price the effective ceiling in determining investment value. It is this practice of the Commission which the Court was referring to and approving in the statement from the *Engineers* case relied on by Bond and Share.

Thus, when this Court used "could" in the *Engineers* case in connection with redemption provisions, there was

* 338 U. S. at 131, 134.

an implicit recognition that the Company, under such circumstances, "would" call the stock. On the other hand, charter liquidation provisions that only "could" have been invoked, but lack the implicit "would", do not have a comparable effect on investment value. Such provisions can only be given weight if liquidation would have occurred for business reasons, wholly apart from the Act; otherwise, they can have no legitimate impact upon investment value.

To meet this difficulty, Bond and Share urges (petitioner's brief, Point II) that it "would" have made a distribution of capital in retirement of its preferred, even if the Act had not compelled that retirement. The short and simple answer is that the Commission found the contrary, and did this on the basis of the testimony of the chief executive officer of Bond and Share that "if I were not under the impact of the Holding Company Act, I would keep this money, keep the preferred stock out, and would find use for it profitably" (R. 53, 54, 377).

In its Point III, Bond and Share argues that under its charter it could have retired its preferred stocks by a "distribution of capital" of $100 per share. We have noted supra (pp. 10-11) that what Bond and Share "could" have done under its charter is irrelevant since the measure of fair and equitable treatment of the preferreds is the investment value of that security. Moreover, the District Court held that, under its charter liquidation provision, Bond and Share could not have effected this result. Assuming that the propriety of that determination is one for present consideration, it is readily demonstrable that the holding below is sound.

The District Court properly held that the "distribution of capital" provision in the charter had reference only to a situation in which there was at least "some payment or distribution to the common," and that adoption of Bond and Share's interpretation of the provision would render meaningless the redemption provision of the charter. As

a matter of construction, it is clear that the phrase "distribution of capital" can only refer to a distribution in connection with a liquidation (*People of Colorado* v. *Great Western Sugar Co.*, 29 F. 2d 810 (8th cir. 1928).

Bond and Share claims it could have retired its preferred stock, absent the Act, by a "distribution" of $100 per share, by utilizing the mechanics of either Sections 36 or 105 of the New York Stock Corporation Law. Since under Section 36 the preferred stock would clearly be a class "adversely affected", the consent of the holders of two thirds of such stock would be required (Section 37, New York Stock Corporation Law). Further, any dissenting preferred stockholder would be entitled to have his stock appraised and upon such appraisal to receive its fair investment value (*Matter of Fulton*, 257 N. Y. 487, 495). Thus, the very standards established by this Court in the *Otis* and *Engineers* cases, *i.e.*, "fair investment value", is the measure of such a dissenting stockholder's claim under New York law. As to Section 105, which deals with voluntary dissolution, since the common stockholders have not voted for such dissolution and do not propose to do so, it has no relevancy.

B

Bond and Share complains in its Point IV (petitioner's brief, pp. 29-31) that, in determining the investment value of the preferred stock, the Commission gave effect to reorganizations of subsidiary companies that could only have been accomplished under the Act. Petitioner contends that this violates the rule laid down by this Court in the *Engineers* case that investment value is to be determined without reference to the present liquidation or reorganization required by the Act.

We have noted (*supra*, p. 9) that the Commission did not find that the subsidiary reorganizations would only

have taken place under the Act and, furthermore, that petitioner's own expert testified that such reorganizations would have taken place had there been no Act.

However, even if the Commission had given effect to reorganizations of subsidiary companies that could have only taken place under the Act, in doing so, quite obviously it would not have violated the rule of the *Engineers* case. The statement by this Court that investment value is to be determined without reference to the present liquidation was an assertion that in determining fair and equitable treatment to a particular class, the measure of its worth is to be determined by investment or going concern value. Under the standard in the *Engineers* case, Bond and Share is to be considered as a going concern. But as a going concern it holds portfolio securities, the stocks of its subsidiaries, and to the extent that the value of these portfolio securities will be affected by the impact of the Act on the subsidiaries, recognition must be given thereto in determining the going concern value of Bond and Share itself. Further elaboration is unnecessary in view of the District Court's able consideration and disposition of this untenable claim (R. 11-12).

C

Petitioner's contention that the Commission erred, as a matter of law, in basing its investement value appraisal on the stock yield levels prevailing between November, 1945, and March, 1947, in that that was a period of abnormally high market values of a transient nature, finds its refutation, as we noted previously, in the mere statement of the proposition. There is nothing transient about market levels prevailing for a period of a year and a half. Moreover, this Court in the *Engineers* case accepted as the proper measure market values in January, 1946, a date

within the period of which Bond and Share now complains; and the Court of Appeals for the Third Circuit in *In re Pennsylvania Edison Co.*, 176 F. 2d 764, rejected a similar contention and accepted as an appropriate date June 30, 1946, again within the same period.

D

Petitioner finally urges that, in any event, the Commission should not have awarded to the preferred stockholders compensation for delay in payment at the annual rate of 5.45% (petitioner's brief, pp. 33-36). That rate was arrived at as a result of the Commission's conclusion that the investment value of the $6 preferred stock on the date it was retired was $110 per share and that, therefore, the preferred stockholders were entitled to that sum as of that date. Instead, as of that date, they received $100, or 10/11ths of their participating interest in the enterprise. Their participation entitled them to a return of $6, and $6 on a claim of $110 represents a return of 5.45%. To the extent that the shareholders did not receive the measure of their full participation, they are entitled to a continued return on the unpaid balance thereof.

This was the identical procedure followed by the Commission in the *Engineers* case, and that determination of the Commission was affirmed by this Court. Petitioner contends that the propriety of the compensation in the *Engineers* case was there challenged by the preferred stockholders on the ground that it was inadequate, while here it is challenged by common stockholders on the ground that it is excessive (pp. 35-36). The fact nevertheless remains that, under challenge, this Court found that payment proper, and its ruling to that effect was deemed controlling, when challenged by common stockholders, by the Court of Appeals for the Third Circuit in *In re Pennsylvania Edison Company, supra*, by a District Court in the First Cir-

cuit in *In re New England Public Service*, 94 F. Supp. 343, as well as the Court of Appeals for the Second Circuit in the *Federal* case, *supra*.

Conclusion

There is no important public question involved in this case. The decision of the District Court is in accord with the decisions in the Second Circuit and in the other circuits—there is no conflict. Therefore, and for the additional reasons stated, i. e., (a) a writ should not, because of the particular circumstances here involved, issue prior to consideration by the Court of Appeals, (b) the principal questions posed are not presented by the record, and (c) even as posed, the questions have been previously resolved by this Court, these respondents respectfully pray that the petition for a writ of certiorari be denied.

Dated: May 21, 1951.

Respectfully submitted,

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APPENDIX

Section 11(e).

Section 11(e) of the Public Utility Holding Company Act [15 U. S. C. 79k(e)] reads as follows:

"Sec. 11(e). In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may so constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed."